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# In the Supreme Court
## of the United States

OCTOBER TERM 1970

No. ~~1609~~ 70-197

RAYMOND KELLY,

*Petitioner,*

v.

UNION PACIFIC RAILROAD COMPANY,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON**

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# In the Supreme Court
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RAYMOND KELLY,

*Petitioner,*

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UNION PACIFIC RAILROAD COMPANY,

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON**

### OPINIONS OF THE COURT BELOW

This cause was tried in the Circuit Court of Multnomah County, Oregon, to a jury which returned a verdict for the defendant railroad. The plaintiff appealed to the Supreme Court of Oregon which affirmed the lower court's judgment on February 24, 1971.

It is from this judgment that plaintiff petitions for certiorari. A true and correct copy of the opinion of the Oregon Supreme Court, reported at — Or. —, 481 P.2d 56, is appended hereto.

## JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked because the case involves the proper interpretation of the Federal Employers Liability Act (FELA), 45 U.S.C. § 51, et seq. The petitioner does not seek a mere review of evidence or facts, but prays for the formulation by this Court of the correct manner of applying the FELA to *all* actions arising thereunder.

## QUESTION PRESENTED FOR REVIEW

This court said in *Rogers* v. *Missouri Pac. R.R.*:[1]

> "Under this statute [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. *It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes,* including the employee's contributory negligence."

The court further stated in *Rogers*:

> "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."[2]

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[1] 352 U.S. 500 at 506-507, 1 L. Ed. 2d at 499-500 (1957) (Emphasis added)

[2] 352 U.S. at 508.

The trial court in the instant case instructed the jury that it must be convinced by a preponderance of the evidence; that it must *weigh* the evidence; but if the evidence was equal, it must find against the party with the burden of proof (the plaintiff).[3]

Thus, the question presented to this court is whether or not a plaintiff in a FELA action must be saddled with this common law burden of persuasion,[4] or whether the rule of *Rogers*, carried to its logical conclusion, substantially modified plaintiff's burden of persuasion and requires only that plaintiff offer evidence from which the jury may infer, with reason, that employer negligence caused or contributed to the cause of plaintiff's injuries.

## ARGUMENT

Every trial court in the nation violates the spirit of the rule and commits prejudicial error when it instructs the jury to return a verdict for the defendant if the evidence appears to be equally balanced or if it

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[3] The complete text of the instruction is:

"You are to consider the evidence as though it were being weighed on a scale and if upon any issue in the case, the evidence appears to be equally balanced or if you cannot say upon which side it weighs the heavier you should resolve the issue against the plaintiff upon whom the burden of proof rests. Mere speculation or guesswork will not suffice to prove any issue in this case." (Tr. 22)

[4] To convince the jury by a preponderance of evidence that the negligence of the defendant is more probable than not.

cannot tell which side weighs heavier, because in giving such charge, the court invades the province of the jury.

The evidence in this case, having been sufficient to submit to the jury for determination, the trial court should have instructed the jury that even if the evidence were equally balanced, or if it could not tell which weighed heavier, the jury must select from the proofs, with reason, the set of circumstances which the jury believed caused or contributed to the cause of plaintiff's harm; and further, that the jury was free to discard or disbelieve whatever facts were inconsistent with its conclusion.[5]

Beginning with the case of *Lavender* v. *Kurn*,[6] where the Court emphasized the requirement of a jury determination in an FELA case, even though a measure of speculation is involved, and culminating with the *Rogers* case, this Court has held that the injured railroad employee is entitled to a liberal construction of the principles of the Act. The FELA released railroad employees from the bondage of the common law burden of proof doctrines. The Fifth Circuit Court of Appeals in *Boeing Co.* v. *Shipman*[7] recognized this concept when it said that plaintiff's burden of proof in an FELA case is:

> ". . . much less than the burden required to sustain recovery in ordinary negligence actions."

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[5] See *Dennis* v. *Denver & Rio Grande W.R.R.*, 375 U.S. 208 (1963).

[6] 327 U.S. 645 (1946).

[7] 411 F.2d 365, 371 (5th Cir. 1969).

Other decisions by this Court have clarified the so-called *Rogers* rule and have re-emphasized the role of the jury in an action under the FELA:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . ."[8]

Justice Holman, speaking for the Oregon Supreme Court in the opinion under attack said:

> "It is not quite clear what plaintiff's 'something less' is. He says that 'the plaintiff . . . must only prove that the facts asserted could have happened or were reasonably possible. In other words, the jury might be persuaded by the "lightest" weighing piece of evidence that plaintiff is entitled to recover.' *If plaintiff is saying that the jury must be told that, if there is any evidence to sustain plaintiff's position, plaintiff must prevail, we are sure he is wrong.* If such were the situation, there would be no object in submitting an FELA case to a jury, because any case sufficient to go to the jury would automatically amount to a directed verdict for plaintiff. Plaintiff says that a jury can be persuaded by the

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[8] *Tennant* v. *Peoria & P.U.R. Co.*, 327 U.S. 29, 35, 64 S. Ct. 409, 38 L. Ed. 520, 525 (1944).
Accord: *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108 (1963); *Davis* v. *Baltimore & Ohio R.R.*, 379 U.S. 671 (1965).

> 'lightest' piece of evidence. This is a play on words. The jury was properly told that 'weight' referred to the convincing power of the evidence." (Emphasis added).

The italicized language clearly demonstrates either plaintiff's failure to convey to the Oregon Supreme Court the theory of his appeal or the failure or the unwillingness of the Oregon Court to carefully analyze the basis of the appeal. Petitioner does not take the position that the jury in such circumstance should be advised that any evidence of negligence or causation should result in a plaintiff's verdict. Petitioner merely contends that if there is any evidence of negligence or causation, even though it has less weight or is considered by the court less persuasive or convincing, yet with reason is classified by *the jury* as having greater convincing force or greater weight, then in such circumstances the jury is entitled to return a verdict in favor of the plaintiff. The instruction complained of forcefully informed the jury that an opposite conclusion must result even if the jury preferred to select from the evidence a lesser weighted theory of negligence and causation.

The classic common law doctrine of burden of persuasion—preponderance of evidence—greater weight of evidence — the more convincing evidence — must give way and a reasonable substitute definition of plaintiff's burden of persuasion must develop if the injured railroad employee is to be accorded the full benefits of the Act as previously defined by this

Court. The continued and almost universal practice of instructing the jury that plaintiff must prove his case by a preponderance of evidence or greater weight of the evidence in FELA cases must be halted. Justice Brennan, speaking for the Court in *Rogers*, recognized this necessity when he stated:

> "Special and important reasons for the granting of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of the right to a jury determination."[9]

## CONCLUSION

For the reasons stated, this Court is urged to grant a writ of certiorari to the Supreme Court of Oregon in order to correct the erroneous instruction and formulate the guidelines for all federal and state courts to use in instructing the jury on plaintiff's burden of proof in an FELA case.

Respectfully submitted,

CARLTON R. REITER
GLENN H. PROHASKA
CLIFTON HILDEBRAND
Attorneys for Petitioner

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[9] *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 510 (1957).

## APPENDIX

IN THE SUPREME COURT
OF THE STATE OF OREGON

Department 1

RAYMOND KELLEY,

*Appellant,*

v.

UNION PACIFIC RAILROAD CO., a corporation,

*Respondent.*

* * * * * * * * * *

*Appeal from Circuit Court, Multnomah County*

ALAN F. DAVIS, Judge

Argued and submitted December 2, 1970

Carlton R. Reiter, Portland, argued the cause for appellant. With him on the briefs were Glenn H. Prohaska, and Reiter, Day, Wall & Bricker, Portland.

Walter J. Cosgrave, Portland, argued the cause for respondent. With him on the brief were Randall B. Kester, and Maguire, Kester & Cosgrave, Portland.

Before O'CONNELL, Chief Justice,* and MCALLISTER, HOLMAN, and HOWELL, Justices.

HOLMAN, J.

Affirmed.

HOLMAN, J.

Plaintiff brought an action for damages for in-

* O'Connell, C. J., did not participate in the decision of this case.

juries sustained while in the employment of the defendant. The action was based upon the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51.[1] Plaintiff appealed from a judgment for defendant which was entered pursuant to a jury verdict.

The sole assignment of error is the giving of the italicized portion of the following instruction:

> "Preponderance of the evidence means the greater weight of the evidence, not necessarily the greater volume of the evidence but the more convincing evidence. It may be defined as requiring proof that the facts asserted were more probably true than false. *You are to consider the evidence as though it were being weighed on a scale and if upon any issue in the case, the evidence appears to be equally balanced or if you cannot say upon which side it weighs the heavier, you should resolve the issue against the plaintiff upon whom the burden of proof rests. Mere speculation or guesswork will not suffice to prove any issue in this case.* The law does not require demonstration, that is, such a degree of proof as, excluding the possibility of error produces absolute certainty because such proof is rarely possible. A preponderance of evidence, as that term has been defined by me, only is required."

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[1] "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Plaintiff contends that the instruction is erroneous because a plaintiff's burden of persuasion in an FELA case is "something less" than a preponderance of the evidence. He bases his contention upon a series of decisions of the United States Supreme Court, commencing with *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946), and including *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957). Illustrative of the language which leads plaintiff to his present contention is the following excerpt from *Rogers*:

> "Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question that is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." 352 U.S. at 506-07.

It is not quite clear what plaintiff's "something less" is. He says that "the plaintiff . . . must only prove that the facts asserted could have happened or

were reasonably possible. In other words, the jury might be persuaded by the 'lightest' weighing piece of evidence that plaintiff is entitled to recover." If plaintiff is saying that the jury must be told that, if there is any evidence to sustain plaintiff's position, plaintiff must prevail, we are sure he is wrong. If such were the situation, there would be no object in submitting an FELA case to a jury, because any case sufficient to go to the jury would automatically amount to a directed verdict for plaintiff. Plaintiff says that a jury can be persuaded by the "lightest" piece of evidence. This is a play on words. The jury was properly told that "weight" referred to the convincing power of the evidence.

The cases relied upon by plaintiff[2] are all cases concerning what constitutes sufficient evidence to submit an FELA case to the jury, as the quoted excerpt from *Rogers* indicates. The difficulty with plaintiff's position is that it confuses the test for determining when a case is submissible to a jury with the degree of persuasion plaintiff must establish in the minds of the jury before they may return a verdict for him. Plaintiff purports to see in the language of the cases upon which he relies some lessening of the burden of persuasion imposed upon a plaintiff in FELA cases, as compared with the burden imposed on a plaintiff

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[2] In addition to those cases cited in the body of the opinion, *see Davis* v. *Baltimore & O. R. Co.*, 379 U.S. 671, 85 S. Ct. 636, 13 L. Ed. 2d 594 (1965); *Dennis* v. *Denver & Rio Grande R. Co.*, 375 U.S. 208, 84 S. Ct. 291, 11 L. Ed. 2d 256 (1963); *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963).

at common law. Although there is sufficient ambiguous language in these cases to cause plaintiff to make such a contention,[3] the fact remains that, in each instance, such language was used in deciding whether there had been sufficient evidence to submit a case to the jury. Therefore, we do not read the cases as plaintiff reads them.

The judgment of the trial court is affirmed.

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[3] Apparently, plaintiff's lawyer unsuccessfully attempted to make the same contention in the case of *Caplinger* v. *N. P. Terminal of Oregon*, 244 Or 289, 418 P2d 34 (1966).

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In The

# Supreme Court of the United States

OCTOBER TERM 1970

No. 1-1694 70-197

RAYMOND KELLY,
*Petitioner,*
vs.
UNION PACIFIC RAILROAD COMPANY,
*Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR CERTIORARI

[illegible]
Counsel for Petitioner

[illegible]
Of Counsel:
[illegible]

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In The

# Supreme Court of the United States

OCTOBER TERM 1970

No._____

RAYMOND KELLY,
*Petitioner,*

vs.

UNION PACIFIC RAILROAD COMPANY,
*Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

## BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT UNION PACIFIC RAILROAD COMPANY

### OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Oregon dated February 24, 1971, is set forth in the Appendix to the petition.

### JURISDICTION

Respondent does not dispute this court's jurisdiction to review the judgment of the Supreme Court of Oregon by writ of certiorari. However, this case does not involve the interpretation of the Federal Employers Liability Act (FELA), 45 USC § 51, et seq.

## QUESTION PRESENTED

Respondent does not accept the statement of the Question Presented as set forth by petitioner because the question as stated is a summary of petitioner's argument.

The Question Presented is whether it is error for the Court to instruct the jury in this FELA case that the plaintiff, to recover, must establish his position on the issues by a preponderance of the evidence.

## STATEMENT OF THE CASE

In this case petitioner brought an action for damages for injuries sustained while in the employment of respondent. The action was based upon a claim of negligence under the Federal Employers Liability Act (FELA), 45 USC § 51 et seq. Petitioner appealed from a judgment for respondent which was entered pursuant to a jury verdict. Petitioner contended that an instruction given to the jury was erroneous because the burden of persuasion in an FELA case should be something less than a preponderance of the evidence. The Supreme Court of Oregon affirmed the judgment of the trial court.

## ARGUMENT

Petitioner's claim is based upon the giving of the italicized portion of the following instruction:

> "Preponderance of the evidence means the greater weight of the evidence, not necessarily the greater volume of the evidence but the more convincing evidence. It may be defined as requiring proof that the facts asserted were more probably true than false. *You are to consider the evidence as though it were being weighed on a scale and if upon*

> *any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs the heavier, you should resolve the issue against the plaintiff upon whom the burden of proof rests. Mere speculation or guesswork will not suffice to prove any issue in this case.* The law does not require demonstration, that is, such a degree of proof as, excluding the possibility error produces absolute certainty because such proof is rarely possible. A preponderance of evidence, as that term has been defined by me, only is required."

Several decisions have held that it is proper in an FELA case to instruct the jury that plaintiff must establish each issue in his case by a preponderance of the evidence. The trial court in *Burch v. Reading Co.*, 240 F2d 574 (3rd Cir 1957), instructed the jury as follows:

> "The plaintiff has the burden of proving to you by the weight or the fair preponderance of the evidence that the defendant or its employees, other than the plaintiff, did not provide her with a reasonably safe place to work and that this negligence caused, in whole or in part, this injury to plaintiff. If, after considering all the evidence, the question of whether or not the defendant or its employees, other than the plaintiff of course, were negligent in failing to use reasonable care to provide plaintiff with a safe place to work is so evenly balanced in your mind that you have no conviction, then you must find for the defendant. It is her burden to convince you that there was this negligence. Also, if the question of whether or not such negligence was a factor in causing the injury is so evenly balanced in your mind that you have no conviction, then you must find for the defendant." (p. 577)

The Court of Appeals for the Third Circuit upheld this instruction as proper. A writ of certiorari was pe-

titioned for, but the Supreme Court refused the request. 353 US 965, 1 L Ed 2d 914, 77 S Ct 1049 (1957).

The Missouri Supreme Court has also upheld an instruction similar to the one being contested. In *Pierce v. New York Central R. Co.*, 257 SW2d 84 (1953), the Court stated:

> "Further, defendant asked and obtained Instruction 6, which advised the jury, 'that the burden is upon the plaintiff to prove by the preponderance of all the evidence in the case, every fact, which, under the instructions of the Court he is required to prove in order to make out his case, * * *.' We find no conflict and no error." (p. 87)

In *Dennis v. Denver & Rio Grande R. Co.*, 375 US 208, 11 L Ed 2d 256, 84 S Ct 291 (1963), a case upon which petitioner strongly relies, this Court overruled the Utah Supreme Court's reversal of a jury verdict for an injured employee in an FELA case. The Court held that where there is any evidence of employer negligence in an FELA case, a jury verdict may not be set aside.

The relevance of the *Dennis* decision to this petition is that the trial court instructed the jury in the following manner:

> "In this connection, you are instructed that if you find from a preponderance of the evidence, that the railroad company failed to exercise reasonable care in that it subjected plaintiff to unreasonable exposure to harm from weather conditions, then you are instructed that defendant was negligent in failing to discharge its duty as hereinabove set forth; * * *." (p. 211)

Petitioner's authorities do not relate to instructions with respect to burden of proof and preponderance of

the evidence but rather to the quantum of evidence necessary to constitute a jury case in a Federal Employers Liability Act action.

Petitioner's contention that the trial court erred in instructing the jury on the burden of proof rests entirely on *Lavender v. Kurn*, 327 US 645, 90 L Ed 916, 66 S Ct 740 (1946) and the line of cases following that decision.

In *Lavender v. Kurn*, supra; *Rogers v. Missouri Pac RR.*, 352 US 500, 1 L Ed 2d 493, 77 S Ct 443 (1957); *Davis v. Baltimore & Ohio RR*, 379 US 671, 13 L Ed 2d 594, 85 S Ct 636 (1965); *Gallick v. Baltimore & Ohio RR*, 372 US 108, 9 L Ed 2d 618, 83 S Ct 659 (1963); *Dennis v. Denver & Rio Grande R. Co.*, 375 US 208, 11 L Ed 256, 84 S Ct 291 (1963); and *Wilkerson v. McCarthy*, 336 US 53, 93 L Ed 497, 69 S Ct 413 (1949), this Court overruled appellate courts that had reversed jury verdicts for plaintiffs in FELA actions. The appellate courts had reversed on the basis that there was insufficient evidence for the cases to be submitted to the jury. This Court overruled the appellate courts on the ground that where there was any evidence of employer negligence, however slight, the case must be submitted to the jury and that the jury's verdict in such cases must be allowed to stand.

In these decisions this Court did not purport to rule on the burden of proof in an FELA case. It was concerned solely with seeing, in FELA actions, that the case was decided by the jury where there was any evidence of employer negligence. This Court was concerned

with appellate courts invading the function of the jury by deciding, in effect, questions of fact.

As previously indicated, in the *Dennis v. Denver & Rio Grande RR case*, supra, this Court made no mention of a preponderance of the evidence instruction being improper in an FELA action. Clearly this indicates that the decision was not concerned with burden of proof but rather with seeing that the jury was allowed to decide FELA cases in which there was any evidence of employer negligence.

Petitioner is advocating that the jury be instructed to use the same standard in deciding the issues in the case as is employed in determining whether the case should be submitted to the jury in the first place. Such a proposal is illogical. If a jury were instructed that a plaintiff, to recover, need only introduce some evidence on each issue and not a preponderance of evidence, the jury would inevitably find for the plaintiff since the trial judge, in submitting the case to the jury, has already held that there is some evidence on each issue. Such was the thinking of the Oregon Supreme Court (App. 12). There would thus be no need of a jury in an FELA case. The Congress and this Court surely did not intend such a result.

If petitioner's position were adopted, a plaintiff would recover simply by introducing some evidence, however unconvincing and however strongly refuted, on each issue in the case.

The rule requiring proof of an issue by at least a preponderance of the evidence is not merely a rule of law—

it is a rule of logic. It is inexorable and inescapable. While this Court may have permitted a measure of speculation in determining causation under the FELA, it has not altered the fundamental processes of reasoning. By any rational process, each issue must be resolved in accordance with the weight of the evidence, or it cannot be resolved at all. And if the question cannot be resolved—i.e., if there is no preponderance of the evidence—then there is no rational basis for a verdict against the defendant.

The decisional process requires that there be a burden of proof, or risk of non-persuasion, and failure of proof logically requires that the decision go against the party having the burden of proof. If the burden of proof is accepted—and there was no exception to the instruction on burden of proof as such (R 21)—then there must be a standard for determining whether the burden of proof has been met. With no standard a lawsuit would be merely a game of chance or an exercise in prejudice. And the standard of mere preponderance of the evidence is as little a margin as anyone could reasonably ask.

There can be little doubt that the issues in this case were clearly before the jury. An edited version of 45 USC § 51 was read to the jury which clearly stated that the railroad should be held liable for damages for any injury "resulting in whole or in part from the negligence" of the carrier.

The complete instruction was as follows:

> "As you are aware this action is predicated against the defendant for alleged negligence charged by the plaintiff and is brought under and pursuant to

the act known as the Federal Employers' Liability Act, which provides in part as follows:

> " 'Every common carrier by a railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.' " (R 23-24)

That instruction was followed by the instruction:

> "Under this act the defendant is under the continuous duty to exercise ordinary care under all of the circumstances to provide the plaintiff, as its employee, with a reasonably safe place to work and to furnish reasonably safe tools and equipment for such work. And such duty extends to the premises of third parties or persons, if upon which premises the duties of the employee require him to work. This duty imposed upon the defendant under the law is nondelegable. That is to say, the employer cannot delegate or absolve itself of the performance of this duty to any other employer or person, but it adheres to the defendant without the possibility of suspension or interruption." (R 24)

The trial judge in the contested instruction merely stated to the jury that on each of the issues of the case, which had been clearly drawn, the petitioner must prevail by a preponderance of the evidence.

## CONCLUSION

The lower courts did not err in approving an instruction to the jury that petitioner, to meet his burden of proof, must establish the issues in the case by a preponderance of the evidence.

The petition should be denied.

Respectfully submitted,

MAGUIRE, KESTER & COSGRAVE,
RANDALL B. KESTER,
WALTER J. COSGRAVE,
*Attorneys for Respondent.*